No. 07-507

FILED
NOV 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C., d/b/a CANCER CARE ASSOCIATES,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, US ONCOLOGY, INC. and AOR MANAGEMENT COMPANY OF OKLAHOMA, INC., JPMORGAN CHASE BANK, N.A.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES MEREDITH
Admission Pending
Vice-President & Assistant General Counsel
JPMORGAN CHASE BANK, N.A.
P.O. Box 655415, TX1-2472
Dallas, TX 75265-5415
Telephone: (214) 290-7760
Facsimile: (214) 290-7759

JUSTON M. O'BRIEN
Counsel of Record
MCGLINCHEY STAFFORD PLLC
14th Floor, One American Pl.
Baton Rouge, LA 70825
Telephone: (225) 383-9000
Facsimile: (225) 343-3076
-and-
S. DAVID SMITH
Admission Pending
MCGLINCHEY STAFFORD PLLC
1001 McKinney, Suite 1500
Houston, TX 77002
Telephone: (713) 335-2136
Facsimile: (713) 520-1025

Attorneys for Respondent JPMorgan Chase Bank, N.A.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, JPMorgan Chase Bank, N.A. ("Chase"), submits the following corporate disclosure:

Oklahoma Oncology & Hematology P.C. d/b/a Cancer Care Associates is an Oklahoma professional corporation. It has no parent corporation and is not a publicly traded company.

JPMorgan Chase Bank, N.A. is a national banking association. The association holding company is JPMorgan Chase & Co. which is publicly traded (NYSE: JPM) and utilizes the "brands" JPMorgan Chase, JPMorgan, and Chase.

AOR Management Company of Oklahoma, Inc. is a Delaware corporation with its principal place of business in Oklahoma. It is not a publicly traded company, and is a wholly owned subsidiary of US Oncology, Inc.

US Oncology, Inc. is a Delaware corporation with its principal place of business in Texas. US Oncology, Inc. is a wholly owned subsidiary of US Oncology Holdings, Inc. which is not a publicly traded company. As of December 22, 2006, Morgan Stanley Strategic Investments, Inc. owned 14.7 percent of the common stock of US Oncology Holding, Inc. Public records indicate that all or nearly all of its remaining stock is owned by Welsh Carson Anderson & Stowe, a New York based private equity firm.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
COUNTER-STATEMENT OF THE CASE	2
THE DISPUTE	3
PROCEDURAL HISTORY	6
I. THE PETITION DOES NOT SATISFY THE REQUIREMENTS OF RULE 10	10
II. THE RULE OF LAW REGARDING CHALLENGES TO SUBJECT MATTER JURISDICTION IS CONSISTENT THROUGHOUT THE CIRCUITS; THERE IS NO CIRCUIT SPLIT	11
III. A TRIAL COURT MAY DEFER THE RESOLUTION OF A JURISDICTIONAL CHALLENGE IF THAT CHALLENGE IS INTERTWINED WITH THE MERITS OF THE CASE	19
IV. THIS CLAIM IS NOT RIPE FOR REVIEW	22
V. CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES

Adams v. Bain, 697 F.2d 1213 (4th Cir. 1982) 13, 19

Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 22, 24

Bache Halsey Stuart Shields Inc. v. Garmaise, 519 F. Supp. 682 (S.D.N.Y. 1981) 8

Bannistor v. Ullman, 287 F.3d 394 (5th Cir. 2002) 3

Bell Atlantic v. Twombly, ___ U.S. ___, 127 S.Ct. 1955 (2007) 12

Bierman v. Marcus, 246 F.2d 200 (3rd Cir. 1957) 8, 9

Brown v. Pacific Life Ins. Co., 462 F.3d 384 (5th Cir. 2006) 7

Catlin v. United States, 324 U.S. 229 (1945) 7

Conley v. Gibson, 355 U.S. 41 (1957) 12

E.F.W. v. St. Stephen's Indian High Sch., 264 F.3d 1297 (10th Cir. 2001) 13

El-Hadad v. United Arab Emirates, 496 F.3d 658 (D.C. Cir. 2007) 15

Equitable Life Assurance Soc'y v. Porter-Englehart, 867 F.2d 79 (1st Cir. 1989) 9

Filetech S.A. v. France Telecom S.A., 157 F.3d 922 (2d Cir. 1998) 14

Golden v. Gorno Bros., Inc., 410 F.3d 879 (6th Cir. 2005) 16, 18

TABLE OF AUTHORITIES – Continued

Page

Green Tree Financial Corp. – Alabama v. Randolph, 531 U.S. 79 (2000) 7

Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001) 17

Holloway-Houston, Inc. v. Gulf Coast Bank & Trust Co., No. 01-05-00086, 2006 WL 2435032 (Tex. App. – Houston [1st Dist.] 2006, no pet. h.) 3

In re Am. Marine Holding Co., 14 F.3d 276 (5th Cir. 1994) 22

In re Avental, 343 F.3d 311 (5th Cir. 2003) 22

Int'l Harvester Co. v. Deere & Co., 623 F.2d 1207 (7th Cir. 1980) 13

Land v. Dollar, 330 U.S. 731 (1947) 11, 12

McNutt v. Gen. Motors Acceptance Corp. of Indiana, 298 U.S. 178 (1936) 11, 12

Miller v. French, 530 U.S. 327 (2000) 23

Montez v. Dep't of the Navy, 392 F.3d 147 (5th Cir. 2004) 13, 19, 20

Mortensen v. First Fed. Sav. and Loan Assoc., 549 F.2d 884 (3rd Cir. 1977) 13, 20

Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320 (6th Cir. 1990) 18, 19

Omni Hotel Management Corp. v. Bayer, 2007 WL 1493878 (5th Cir. 2007) 7

Osborn v. United States, 918 F.2d 724 (8th Cir. 1990) 13

TABLE OF AUTHORITIES – Continued

Page

Parr v. United States, 351 U.S. 513 (1956) 23

Phoenix Consulting, Inc. v. Republic of Angola, 216 F.3d 36 (D.C. Cir. 2000) 14, 15, 16

Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 7

Rhoades v. Casey, 196 F.3d 592 (5th Cir. 1999) 8

Riquelme Valdes v. Leisure Resource Group, Inc., 810 F.2d 1345 (5th Cir. 1987) 3

Salmi v. Sec'y of Health and Human Services, 774 F.2d 685 (6th Cir. 1985) 17

Santamaria v. Horsley, 110 F.3d 1352 (9th Cir. 1997) 16

Thornhill Publ'g Co., Inc. v. Gen. Tel. & Electronics Corp., 594 F.2d 730 (9th Cir. 1979) 18, 19

Underwriters at Lloyd's v. Nichols, 363 F.2d 357 (8th Cir. 1966) 9

United States v. Sentinel Fire Ins. Co., 178 F.2d 217 (5th Cir. 1949) 8

Valentin v. Hosp. Bella Vista, 254 F.3d 358 (1st Cir. 2001) 14, 19

Will v. United States, 389 U.S. 90 (1967) 22, 23

Wolfe v. Strankman, 392 F.3d 358 (9th Cir. 2004) 16, 17, 18

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. §1335 4

RULES

Fed. R. Civ. P. 12(b)(1) ..... *passim*

Sup. Ct. R. 10 10

INTRODUCTION

The Petition for Writ of Certiorari in this case involves a ruling from the Fifth Circuit denying a Petition for a Writ of Mandamus in a simple statutory interpleader case. One of the challenged district court rulings concerned the procedure used to deny a motion to dismiss an interpleader action (in which Petitioner claims there is a circuit split (there is not)); the other concerned an order compelling arbitration. Neither raises issues that merit review by this Court.

There is no circuit split. All of the circuits agree that the law is clear in two respects: (a) the district court has discretion in the procedure employed to resolve a motion to dismiss; and (b) it is improper to determine the merits of an interpleader action during a motion to dismiss because a merits-based challenge should be deferred to trial. The Fifth Circuit properly found that the trial judge's rulings were neither clearly erroneous nor contrary to law and properly denied Petitioner's Writ of Mandamus.

Petitioner's arguments, that the district court should have held an evidentiary hearing to determine the merits of the interpleader claims at the preliminary, motion-to-dismiss pleading stage and that the Fifth Circuit should have granted a writ of mandamus, are misplaced. At its base, Petitioner's complaint is that it did not like how the district court exercised its discretion in procedurally addressing its motion.

The district court correctly denied the Rule 12(b)(1) Motion to Dismiss because the interpleader plaintiff sufficiently alleged, and the pleadings filed with the Court supported, a colorable claim to the interpleaded funds by diverse and adverse parties. The Fifth Circuit correctly denied the Petition for a Writ of Mandamus because mandamus is an extraordinary remedy. It is not a substitute for appeal and is not to be used when the most that could be claimed is that the district court erred. Where, as here, a procedural matter is committed to the court's discretion, it cannot be said that a litigant's right to a particular procedure is clear and indisputable. Thus, there was no basis to grant a mandamus. No error has been shown and no issues merit this Court's review. The Petition for Writ of Certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

This statutory interpleader action arose as a result of conflicting claims between (1) Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates ("Petitioner"), (2) US Oncology, Inc. ("USON"), and (3) AOR Management Company of Oklahoma, Inc. ("AOR") to money on deposit with Chase.[1] Petitioner entered into a written management agreement with AOR to operate the business side of Petitioner's oncology operations in exchange for a management

[1] *See* Petitioner's Writ App. 44-52.

fee.[2] Additionally, it appears that USON advanced funds to Petitioner for payment of office expenses and physician compensation in return for which USON obtained either an ownership or security interest in Petitioner's receivables.[3]

From Chase's, the stakeholder's, perspective, a routine lockbox arrangement[4] was set up pursuant to a power of attorney executed by Petitioner authorizing AOR to manage Petitioner's accounts. Pursuant to this arrangement, checks payable to Petitioner were directed by AOR to a designated lockbox account[5] (the "Account") at Chase in the name of Petitioner.

THE DISPUTE

In February 2006, Petitioner notified Chase of its claim to the funds in the Account and disputed AOR's rights to manage the Account.[6] Petitioner then

---

[2] District Court's Memorandum Opinion. Petitioner's Writ App. 2-22.

[3] *See* Petitioner's Writ App. 4.

[4] *See* Petitioner's Writ App. 47. Lockbox accounts for receivables are common, everyday security devices. *Riquelme Valdes v. Leisure Resource Group, Inc.*, 810 F.2d 1345, 1355 (5th Cir. 1987). *See also Bannistor v. Ullman*, 287 F.3d 394, 397 (5th Cir. 2002); *Holloway-Houston, Inc. v. Gulf Coast Bank & Trust Co.*, No. 01-05-00086, 2006 WL 2435032, at *1 (Tex. App. – Houston [1st Dist.] 2006, no pet. h.).

[5] Chase account number XXXXXXXX3216 ("Account").

[6] *See* Petitioner's Writ App. 3.

delivered a set of new corporate resolutions to Chase purporting to remove the signatories from the Account and appointing Petitioner's own list of signatories to the Account.[7] In response to the dispute, Chase placed a hold on the Account, but continued, with consent of the parties, to accept deposits to allow the parties time to resolve the dispute. Chase was advised that AOR challenged Petitioner's actions on the basis that it had an ownership interest in the funds and that Petitioner was acting in conflict with the parties' agreements. USON also claimed an ownership or security interest in the funds.

When it became clear to Chase that the dispute would not be resolved, Chase was faced with conflicting, multiple claims to the money in the Account.[8] Consequently, Chase filed what was supposed to be ordinary and simple statutory interpleader[9] to resolve a dispute amongst three claimants.

On the face of the interpleader complaint, the three named interpleader defendants were: (1) Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates – an Oklahoma citizen, (2) US Oncology, Inc. – incorporated in Delaware with a principal place of business in Texas, and (3) AOR Management Company of Oklahoma – incorporated in Delaware

---

[7] *See* Petitioner's Writ App. 49.

[8] *Id.*

[9] 28 U.S.C. §1335.

with a principal place of business in Oklahoma.[10] In its writ application to this Court and in various pleadings below, Petitioner conceded the citizenship of all three of the interpleader defendants.[11] On the face of the complaint, and in undisputed fact, the minimal diversity required to support a statutory interpleader action, is present.

In the interpleader complaint, Chase alleged that Petitioner claimed an ownership interest in the Account, that AOR claimed a right to manage the Account and an ownership interest in some of the monies maintained in the Account, and that USON claimed an ownership interest in some of the monies.[12] The complaint alleged that each of these claimants were adverse and tendered all of the money on deposit into the registry of the court. Petitioner's answer admitted the parties' adversity.[13] The requirements for a statutory interpleader were clearly met.

---

[10] *See* District Court's memorandum opinion attached to Petitioner's Writ App. 27, n.10 "CCA is an Oklahoma Corporation located in Oklahoma. USON is a Delaware corporation located in Texas. AOR-OK is a Delaware Corporation located in Oklahoma." *See also* Petitioner's Writ App. 44-45.

[11] See p. iii of Petitioner's Writ.

[12] *See* Petitioner's Writ App. 49-50.

[13] *See* Petitioner's answer App. 1-4. "CCA admits that it and Interpleader Defendants [AOR] and USON claim entitlement to the funds deposited into the registry of the Court . . . " Paragraph 6 and "CCA admits that USON and [AOR] claim an ownership in at least a portion of the funds in the Account, but denies that this is a valid claim." Paragraph 13.

PROCEDURAL HISTORY

As discussed above, Chase filed this statutory interpleader action on or about February 27, 2006.[14]

From February until July of 2006, Petitioner agreed that this interpleader was the correct vehicle to resolve the parties' dispute and that the requirements for statutory interpleader had been met. Petitioner even went so far as to request that $15 million of the funds be released to the claimants from the court's registry in June of 2006. It was only after obtaining those funds that Petitioner changed its position and began to assert lack of jurisdiction.

After the trial court denied Petitioner's motion challenging the court's jurisdiction and granted a motion to compel arbitration,[15] Petitioner sought a Writ of Mandamus from the U.S. Fifth Circuit challenging both of these rulings.[16] The Fifth Circuit, in a one page *per curiam* opinion,[17] denied the mandamus request.

---

[14] Petitioner's Writ App. 44.

[15] As Chase was not a signatory to nor a third party beneficiary of the arbitration agreement it takes no position on the resolution of that issue.

[16] Chase opposed the Writ of Mandamus regarding the Motion to Dismiss, however, as Chase was not involved in the arbitration dispute, Chase deferred to USON and AOR on that issue. Likewise here, Chase defers to USON and AOR on the challenge to the arbitration ruling.

[17] The Fifth Circuit's opinion provided in its entirety: "IT IS ORDERED that the petition for writ of mandamus is DENIED.

(Continued on following page)

Undaunted by the Fifth Circuit's denial of its request for a Writ of Mandamus, Petitioner sought an out-of-time rehearing en banc from the Fifth Circuit. While the Fifth Circuit allowed Petitioner to file its pleadings late, the rehearing request was likewise summarily rejected.

Still undeterred, Petitioner then appealed the exact same trial court rulings to the Fifth Circuit. Chase, joined separately by the other two interpleader defendants, moved to dismiss the appeal for lack of appellate jurisdiction. The Fifth Circuit agreed with Chase that it lacked appellate jurisdiction and Petitioner's appeal was dismissed as an improper interlocutory appeal.[18]

Now that the Fifth Circuit has twice rejected Petitioner's challenges to the district court's rulings, Petitioner continues its attempt to transform what is, from the stakeholder's perspective, a simple

---

The motion for leave to file a reply is DENIED. The Request for Oral Argument is DENIED."

[18] It is well established that the denial of a motion to dismiss for lack of subject matter jurisdiction is not subject to immediate appeal because it is not considered a final judgment. *Catlin v. United States*, 324 U.S. 229, 236 (1945); *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 149 (1993). Likewise, interlocutory orders granting a stay or directing arbitration to proceed are not appealable. *Green Tree Financial Corp. - Alabama v. Randolph*, 531 U.S. 79, 86 (2000); *Omni Hotel Management Corp. v. Bayer*, 2007 WL 1493878 (5th Cir. 2007); *Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 390-391 (5th Cir. 2006).

interpleader, into a costly, vexatious, multi-party, and multi-year litigation[19] matter by seeking a Writ of Certiorari from this Court regarding the Fifth Circuit's refusal to grant a Writ of Mandamus.

Interpleader is supposed to be a simple and inexpensive means for a stakeholder (Chase) to relieve itself of the vexation and cost of litigation when there are multiple claims to the stake.[20] The stakeholder is to deposit the money with the court and then is released from the litigation while the claimants dispute entitlement to the funds. The stakeholder is not required to prove any claims or to adjudicate the dispute between the claimants.[21] Rather, the stakeholder merely has the minimal burden of establishing a reasonable fear of liability to

---

[19] While Petitioner complains about how long the funds have been in the registry of the Court, it is Petitioner which has lengthened these proceedings by continuing its baseless procedural challenges, and refusing to arbitrate.

[20] *Bierman v. Marcus*, 246 F.2d 200 (3rd Cir. 1957), *writ denied*, 356 U.S. 933.

[21] *United States v. Sentinel Fire Ins. Co.*, 178 F.2d 217, 233 (5th Cir. 1949); *see also Rhoades v. Casey*, 196 F.3d 592, 600 (5th Cir. 1999) (differentiating between the first stage of an interpleader action, in which jurisdiction is determined, and the second stage, in which the respective rights of the claimants are determined); *Bache Halsey Stuart Shields Inc. v. Garmaise*, 519 F. Supp. 682, 684-85 (S.D.N.Y. 1981) ("a party is not required to evaluate the merits of conflicting claims at its peril").

the claimants.[22] Here, those requirements have been met.

Petitioner, decrying the procedure used by the district court to deny its motion to dismiss, conjures a supposed circuit split out of thin air. In order to create this "circuit split," Petitioner (1) fails to rely upon a single case concerning a writ of mandamus, (2) fails to address the standard for reviewing an appellate court's refusal to grant a mandamus, (3) omits key portions of the relevant law regarding resolution of Rule 12(b)(1) motion issues that are intertwined with the merits of the case, (4) ignores the fact that none of its cited cases deal with a statutory interpleader, and (5) glosses over the procedural posture of the case which indicates that the subject disputes are not ripe for this Court's review.

In addition to ignoring the realities of the case, Petitioner's procedural recitation fails to acknowledge Petitioner's unsuccessful appeal to the Fifth Circuit of the exact same issues it raised in its rejected Writ of Mandamus and fails to acknowledge

---

[22] *See Equitable Life Assurance Soc'y v. Porter-Englehart*, 867 F.2d 79, 84 (1st Cir. 1989) ("to support an interpleader action, the adverse claims need attain only a *minimal* threshold level of substantiality") (emphasis added); *Bierman v. Marcus*, 246 F.2d 200, 201 (3rd Cir. 1957) (holding that it is immaterial whether the stakeholder believes that all claims against the fund are meritorious); *Underwriters at Lloyd's v. Nichols*, 363 F.2d 357, 365 (8th Cir. 1966) (noting that it is the possibility of multiple litigation, not necessarily the likelihood of duplicative liability, that justifies resort to interpleader).

that to be entitled to a Writ of Mandamus Petitioner must show that the trial court clearly and indisputably erred. The Writ must be denied.

I. THE PETITION DOES NOT SATISFY THE REQUIREMENTS OF RULE 10.

This case does not involve a circuit split, an important federal question, or a departure by the lower courts from the accepted and usual course of judicial proceedings.[23] To the contrary, the lower courts' decisions regarding the challenge to subject matter jurisdiction comply fully with established principles regarding the methods to address such challenges. The ruling properly followed this Court's guidance that the district court has great discretion in determining the procedure used in resolving challenges to subject matter jurisdiction. In addition, the trial court properly determined, in accord with this Court's precedent, that merit based claims intertwined with jurisdictional issues should be deferred to the merits and not decided at a preliminary pleading stage. Thus, there is no basis for granting the Petition for a Writ of Certiorari.

---

[23] *See* Supreme Court Rule 10.

II. THE RULE OF LAW REGARDING CHALLENGES TO SUBJECT MATTER JURISDICTION IS CONSISTENT THROUGHOUT THE CIRCUITS; THERE IS NO CIRCUIT SPLIT.

A Rule 12(b)(1) motion challenges whether the district court has subject matter jurisdiction to hear the matter. This Court's decisions in *McNutt v. Gen. Motors Acceptance Corp. of Indiana*[24] and *Land v. Dollar*,[25] establish a consistent rule of law that a district court has wide discretion in establishing the procedure for addressing a Rule 12(b)(1) motion. This rule is aptly stated by this Court in *Land*: "there is no statutory procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court."[26] Each circuit has adhered to this rule of law granting the district court wide discretion in deciding how to proceed.

The rule is straight-forward. The initial step performed by each court is the determination of whether the motion to dismiss is one advancing a facial challenge or a factual challenge. This distinction from a procedural perspective is important

---

[24] *McNutt v. Gen. Motors Acceptance Corp. of Indiana*, 298 U.S. 178 (1936).

[25] *Land v. Dollar*, 330 U.S. 731 (1947).

[26] *Land*, 330 U.S. at 735 n.4; *see also McNutt*, 298 U.S. at 185 (statute does not prescribe a method for determining how to address a motion to dismiss for a lack of jurisdiction).

because the class of the challenge sets the parameters of what procedural mechanisms and safeguards apply to the plaintiff.

Where the mover mounts a facial challenge, the allegations contained in the complaint are taken to be true, and the court must decide the motion on the face of the pleadings. Where the mover mounts a factual challenge, the court is not bound to accept the allegations of the pleading as true. Indeed, under a factual challenge, the examining court is given wide discretion as to how it will proceed. There is no statutory or jurisprudentially mandated procedure.[27]

It appears that Petitioner has abandoned its facial challenge as Petitioner conceded that the parties are of diverse citizenship, have adverse claims, and that the jurisdictional amount has been met. Consequently, regardless of whether the *Conley*[28] standard or the *Twombly*[29] standard applies, any facial challenge is without merit.

Petitioner avers that certain circuits employ a rule permitting the examining court discretion as to how factual challenges are to be resolved, while other circuits supposedly employ a rule compelling

---

[27] *Land*, 330 U.S. at 735 n.4; *see also McNutt*, 298 U.S. at 185.

[28] *Conley v. Gibson*, 355 U.S. 41 (1957).

[29] *Bell Atlantic v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955 (2007).

evidentiary hearings.[30] A review of the relevant jurisprudence shows that each circuit adheres to the same rule of law established by this Court regarding the district court's discretion in establishing the procedure to be employed in addressing Rule 12(b)(1) motions to dismiss.

Petitioner admits that six circuits adhere to the prevailing rule of law regarding Rule 12(b)(1) motions, which allot examining courts wide discretion as to procedures for deciding Rule 12(b)(1) motions.[31] Specifically, Petitioner admits that the Third, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits adhere to a rule granting the examining court wide procedural discretion in resolving factual challenges.[32]

Petitioner suggests, in somewhat equivocal language, that the remaining circuits "appear to" adhere to a different standard, apparently requiring a particular procedure and allegedly disregarding any rule giving the district court broad discretion to decide Rule 12(b)(1) motions. However, an examination of the

---

[30] *See* pages 22-23 of Petitioner's Petition for Writ of Certiorari.

[31] *See* pages 23-24 of Petitioner's Petition for Writ of Certiorari.

[32] The rule of law followed in these circuits can be found at: *Mortensen v. First Fed. Sav. and Loan Assoc.*, 549 F.2d 884 (3rd Cir. 1977); *Adams v. Bain*, 697 F.2d 1213 (4th Cir. 1982); *Montez v. Dep't of the Navy*, 392 F.3d 147 (5th Cir. 2004); *Int'l Harvester Co. v. Deere & Co.*, 623 F.2d 1207 (7th Cir. 1980); *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990); and *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297 (10th Cir. 2001).

cases cited by Petitioner, coupled with the prevailing jurisprudence of these circuits, shows otherwise.

Petitioner, relying on a parenthetical, claims the First Circuit applies a different rule, but a careful review of *Valentin v. Hosp. Bella Vista,* 254 F.3d 358 (1st Cir. 2001)[33] reveals that the First Circuit adheres to the same rule as the Third, Fourth, Fifth, Seventh, and Tenth Circuits.[34] The First Circuit stated that where "a factbound jurisdictional question looms, a court must be allowed *considerable leeway* in weighing the proof, drawing reasonable inferences, and satisfying itself that subject-matter jurisdiction has attached." (Emphasis added.). The First Circuit continued by noting that "an evidentiary hearing is not necessary."[35] Thus, it is clear that the First Circuit adheres to the same rule as the majority of circuits granting the trial court discretion regarding the procedure to address Rule 12(b)(1) factual challenges.

Similarly, Petitioner cites *Filetech S.A. v. France Telecom S.A.*[36] and *Phoenix Consulting, Inc. v. Republic*

---

[33] 254 F.3d 358 (1st Cir. 2001).

[34] The applicant stresses that the First Circuit noted that a 12(b)(1) factual challenge "permits (indeed, demands) differential factfinding" but essentially stops its analysis of the Court's decision at this point. The remainder of the case clearly demonstrates that the district court has great discretion in determining the procedure to resolve the motion.

[35] *Valentin*, 254 F.3d at 364.

[36] *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998).

of Angola,[37] as evidence that the Second Circuit and the D.C. Circuit respectively adhere to a different rule of law. These decisions cannot be used to create a circuit split. Both cases address an exception not applicable here to the prevailing rule of law regarding factual challenges to Rule 12(b)(1) motions; namely, the right of a sovereign nation to immunity from suit under the Foreign Sovereign Immunities Act (FSIA).[38]

Both cases did remand for further proceedings with instructions to resolve the jurisdictional questions by looking beyond the pleadings. However, the rationale for looking beyond the pleadings in these two instances was specifically related to the applicability of FSIA (a situation not applicable here). The FSIA provides immunity to foreign nations from suit in either federal or state court. It is this sovereign immunity that alters the procedure that a district court must employ when questions of subject matter jurisdiction arise. Courts are encouraged under this narrow circumstance to determine jurisdiction as early as possible, and to not defer any decision to the merits because to do otherwise would "frustrate the

---

[37] *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36 (D.C. Cir. 2000).

[38] *See, e.g., El-Hadad v. United Arab Emirates*, 496 F.3d 658 (D.C. Cir. 2007) (recognizing that an interlocutory appeal of the denial of a motion to dismiss under the FSIA was proper).

significance and benefit of entitlement to immunity from suit."[39]

These decisions cannot support a circuit split because the underlying facts and presence of issues regarding sovereign immunity require a full factual determination without postponement to the merits to preserve the privileges afforded sovereigns to be free from suit. In other words, the procedure is different in FSIA suits than in interpleader (or any other kind of) suits.

Finally, Petitioner cites language from the Ninth Circuit's opinion in *Wolfe v. Strankman*[40] and the Sixth Circuit's opinion in *Golden v. Gorno Bros., Inc.*,[41] as evidence that these Circuits purportedly adhere to a different rule of law. Neither of these decisions support a circuit split because they are not binding in the circuit that issued them.

Both the Ninth Circuit and the Sixth Circuit adhere to the rule that later panels cannot overrule previous panels without an *en banc* ruling or intervening Supreme Court decision. "It is settled law that one three-judge panel of this court cannot ordinarily reconsider or overrule the decision of a prior panel . . . even if we believe the precedent to be erroneous." *See Santamaria v. Horsley,* 110 F.3d 1352, 1355 (9th Cir.

---

[39] *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000).

[40] *Wolfe v. Strankman*, 392 F.3d 358 (9th Cir. 2004).

[41] *Golden v. Gorno Bros., Inc.*, 410 F.3d 879 (6th Cir. 2005).

1997) (internal citations omitted); *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court."); and *Salmi v. Sec'y of Health and Human Services*, 774 F.2d 685, 689 (6th Cir. 1985) ("A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision."). A second, later panel is bound by the first panel's decision. Should a second panel issue an opinion that conflicts with the first panel's ruling, the second decision is entitled to no weight. As will be explained below, that is exactly what happened here.

The two cases demonstrate that the Sixth and Ninth Circuits are not following their own precedents and not obeying their own rules that a subsequent panel cannot overrule a previous panel. In each case cited by Petitioner, the appellate panel derogated from prior panel opinions that were in conformity with all other circuits. Further, the Ninth Circuit[42]

[42] Specifically, in *Wolfe*, the Ninth Circuit stated that where a moving party pursues a "factual motion [to dismiss] by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Wolfe*, 392 F.3d 358, 362 (9th Cir. 2004).

and Sixth Circuit[43] opinions source back to cases that endorse the prevailing rule that examining courts have great discretion as to how their factual challenge determinations will be conducted. Thus, Petitioner has failed to demonstrate a circuit split.

The Ninth Circuit's jurisprudence, including the *Wolfe* decision, regarding factual challenges traces back to its 1979 decision in *Thornhill Publ'g Co., Inc. v. Gen. Tel. & Electronics Corp.*,[44] where the panel adopted the discretionary rationale, followed by all other circuits, that the examining court "**may** consider the evidence presented [in a factual jurisdictional challenge] and rule on that issue."[45] Additionally, the Sixth Circuit's jurisprudence on the same subject, including the *Golden* decision, traces back to its decisions in *Ohio Nat'l Life Ins. Co. v. United States*, where the panel, holding that the party advancing a factual challenge to jurisdiction was not entitled to an evidentiary hearing, stated that "in the absence of statutory direction . . . district courts have **discretion**

---

[43] Specifically, in *Golden*, the Sixth Circuit stated that where "a Rule 12(b)(1) motion attacks the factual basis for jurisdiction, the district court must weigh the evidence and the plaintiff has the burden of proving that the court has jurisdiction over the subject matter." *Golden*, 410 F.3d 879, 881 (6th Cir. 2005).

[44] *Thornhill Publ'g Co., Inc. v. Gen. Tel. & Electronics Corp.*, 594 F.2d 730 (9th Cir. 1979).

[45] *Thornhill Publ'g Co., Inc.*, 594 F.2d 730, 733 (9th Cir. 1979). (Emphasis added.).

in developing procedures for reviewing challenges to subject matter jurisdiction."[46]

Both the *Thornhill* and *Ohio National Life* decisions show that the Sixth and Ninth Circuits employ the prevailing rule of law regarding factual challenges as the other circuits do. The prevailing rule of law in each circuit is the same. Where factual challenges to jurisdiction are advanced, the examining court has wide discretion as to what procedures are to be employed to decide the question. There is no circuit split. The Writ of Certiorari must be denied.

III. A TRIAL COURT MAY DEFER THE RESOLUTION OF A JURISDICTIONAL CHALLENGE IF THAT CHALLENGE IS INTERTWINED WITH THE MERITS OF THE CASE.

In instances where disputed jurisdictional issues are intertwined with the merits of the underlying matter, prevailing Rule 12(b)(1) jurisprudence maintains that examining courts refrain from dismissal at preliminary stages of the litigation and defer ruling on jurisdiction challenges. Indeed, a number of cases cited by the Petitioner echo this standard. *See Valentin v. Hosp. Bella Vista,* 254 F.3d 358, 364, n.3 (1st Cir. 2001); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); and *Montez v. Dep't of the Navy*, 392 F.3d 147, 150 (5th Cir. 2004). This argument is especially

[46] *Ohio Nat'l Life Ins. Co. v. United States,* 922 F.2d 320, 327 (6th Cir. 1990). (Emphasis added.).

relevant to Sherman Act cases, where jurisdictional and merit-based facts are frequently intertwined. *See Mortensen v. First Fed. Sav. and Loan Assoc.*, 549 F.2d 884 (3rd Cir. 1977).

By deferring jurisdictional questions, the lack of jurisdiction takes on the character of a direct attack on the merits of the complaint.[47] In this matter, the district court correctly refused to address the Petitioner's purported jurisdictional claims because resolution of those claims would be tantamount to resolving the merits of one of the interpleaded defendant's claims.

The rationale for delaying jurisdictional decisions intertwined with the merits is concomitantly one of the underlying reasons for giving a court examining factual jurisdiction challenges wide discretion as to how to proceed; namely, to afford all litigants a fair opportunity to have their ostensibly legitimate claims heard. In dicta, the Fifth Circuit expounded on this rationale in *Montez*, 392 F.3d at 150 where it stated:

> No purpose is served by indirectly arguing the merits in the context of federal jurisdiction. Judicial economy is best promoted when the existence of a federal right is directly reached and, where no claim is found to exist, the case is dismissed on the merits. This refusal to treat indirect attacks on the merits

---

[47] *Montez v. Dep't of the Navy*, 392 F.3d 147, 150 (5th Cir. 2004).

> as Rule 12(b)(1) motions provides, moreover, a greater level of protection to the plaintiff who in truth is facing a challenge to the validity of his claim.

Here, Petitioner couched its motion to dismiss as one for lack of subject matter jurisdiction, claiming that the statutory interpleader was improper. Specifically, Petitioner argued that USON, (1) had no legitimate claim to the stake, and (2) was an alter-ego of the remaining interpleaded defendant. These two arguments are patently merits-based arguments. Surely, an attack by one interpleaded defendant that another claimant had no legitimate claim goes directly to the heart of the merits of the matter. The jurisprudence is overwhelming that the stakeholder need not determine the validity of a claim prior to filing an interpleader. Petitioner's alternatively arguing that one claimant is an alter-ego of another would defeat that claimant's right to the stake, also a clear merits-based decision.

Irrespective of the Petitioner's argument, the district court properly held, and the appellate court properly affirmed, that consideration of these issues was premature as these issues squarely addressed the merits of USON's claim. Relying on the settled Rule 12(b)(1) authority that the merits of the case should not be decided on a Rule 12(b)(1) motion to dismiss, the trial court and the Fifth Circuit properly rejected addressing questions that intertwined with the merits.

IV. THIS CLAIM IS NOT RIPE FOR REVIEW.

Interplayed with the statutory interpleader legal issues is the procedural posture of this case. Petitioner's writ is a challenge to the Fifth Circuit's denial of a Writ of Mandamus. As this Court has explained, only exceptional circumstances amounting to a "judicial usurpation of power" justify the invocation of this mandamus remedy.[48]

Merely showing that the district court erred is insufficient to obtain mandamus relief. Furthermore, a mere showing of error that may be corrected on appeal is an insufficient basis for a grant of the writ because "it is more than well-settled that a writ of mandamus is not to be used as a substitute for appeal."[49] Thus, to establish entitlement to mandamus relief it must be shown not only that the lower court erred, but that it *clearly and indisputably* erred.[50] Moreover, an applicant for mandamus must show that the "clear and indisputable" error is irremediable on ordinary appeal.[51]

Petitioner contends that the trial court erred by (1) improperly exercising jurisdiction over the interpleader without jurisdictional discovery and an

---

[48] *Will v. United States*, 389 U.S. 90, 95 (1967).

[49] *In re Am. Marine Holding Co.*, 14 F.3d 276, 277 (5th Cir. 1994).

[50] *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980).

[51] *In re Avental*, 343 F.3d 311 (5th Cir. 2003).

evidentiary hearing; and (2) ordering arbitration between the claimants. Petitioner falls short of satisfying its burden because each of these unremarkable points of error may be remedied on direct appeal and none of them rise to the level of judicial indiscretion requiring the drastic remedy of mandamus. Further, this Court's cases indicate that the procedure for deciding a Rule 12(b)(1) motion is at the trial court's discretion. Mandamus is simply not available to remedy a claimed error in the exercise of the district court's discretion.

Thus, the Fifth Circuit was correct in denying the Writ of Mandamus and the claim is not ripe for review. The writ must be denied.

V. CONCLUSION

This case comes before this Court on a petition seeking review of the denial of a Petition for a Writ of Mandamus. Mandamus is an extraordinary remedy. It is not a substitute for appeal and does not "run the gauntlet of reversible errors." *Will v. United States,* 389 U.S. 90, 97 (1967). The writ is not to be used when "the most that could be claimed is that the district courts have erred." *Parr v. United States,* 351 U.S. 513, 520 (1956).

Additionally, before a writ of mandamus can be issued, the party seeking it must show that his right to the relief requested is clear and indisputable. *Miller v. French*, 530 U.S. 327, 339 (2000). And "where a matter is committed to discretion, it cannot

be said that a litigant's right to a particular result is clear and indisputable." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).

The procedural method used to determine a Rule 12(b)(1) challenge is left to the trial court's discretion, and the trial court in this instance exercised that discretion in light of the unique facts of the case. No error has been shown and no issues merit this Court's review. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES MEREDITH
Admission Pending
Vice-President & Assistant
General Counsel
JPMORGAN CHASE BANK, N.A.
P.O. Box 655415, TX1-2472
Dallas, TX 75265-5415
Telephone: (214) 290-7760
Facsimile: (214) 290-7759

JUSTON M. O'BRIEN
Counsel of Record
MCGLINCHEY STAFFORD PLLC
14th Floor, One American Pl.
Baton Rouge, LA 70825
Telephone: (225) 383-9000
Facsimile: (225) 343-3076
-and-
S. DAVID SMITH
Admission Pending
MCGLINCHEY STAFFORD PLLC
1001 McKinney, Suite 1500
Houston, TX 77002
Telephone: (713) 335-2136
Facsimile: (713) 520-1025

Attorneys for Respondent JPMorgan Chase Bank, N.A.